Supreme Court, U.S.
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No.

In the Supreme Court of the United States

USA MOBILITY WIRELESS, INC.
PETITIONER,
v.
JERILYN QUON; APRIL FLORIO; JEFF QUON;
STEVE TRUJILLO,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred by holding that a service provider is liable as a matter of law under the Stored Communications Act, 18 U.S.C. §§ 2701–2712, for disclosing to a subscriber of the service the contents of communications stored in long-term archives on the provider's computers, without the consent of the sender or recipient of the message.

PARTIES TO THE PROCEEDING BELOW

Plaintiffs and appellants below were Jeff Quon, Jerilyn Quon, April Florio, and Steve Trujillo. Plaintiff Doreen Klein did not file an appeal.

Defendants and appellees below were Arch Wireless Operating Company, Inc., City of Ontario, City of Ontario Police Department, Debbie Glenn, and Lloyd Scharf.

CORPORATE DISCLOSURE STATEMENT

Arch Wireless Operating Company, Inc. ("Arch Wireless"), the original defendant in this case, has since merged into Metrocall, Inc., which later became USA Mobility Wireless, Inc. USA Mobility Wireless, Inc. is an indirect subsidiary of the publicly held USA Mobility, Inc., the nation's largest provider of paging services. No publicly held company has a 10 percent or greater ownership interest in USA Mobility, Inc., and USA Mobility, Inc. has no parent company.

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OPINIONS BELOW

The Ninth Circuit panel opinion is reported at 529 F.3d 892 (9th Cir. 2008) (Pet. App. 1–40[1]). The order denying rehearing and rehearing en banc is reported at 554 F.3d 769 (9th Cir. 2009) (Pet. App. 124–50). The opinion of the United States District Court for the Central District of California granting summary judgment in favor of Arch Wireless is reported at 445 F. Supp. 2d 1116 (C.D. Cal. 2006) (Pet. App. 41–116).

JURISDICTION

The Ninth Circuit panel issued its opinion on June 18, 2008. Arch Wireless filed a timely petition for rehearing or rehearing en banc on July 9, 2008. The Ninth Circuit issued an order denying rehearing or rehearing en banc on January 27, 2009.

The City of Ontario, the Ontario Police Department, and Lloyd Scharf (collectively, the "City Defendants") filed a petition for a writ of certiorari with this Court, which was placed on the docket on April 29, 2009 as Case No. 08-1332. USA Mobility Wireless, Inc., the successor of Arch Wireless, files this conditional cross-petition pursuant to Supreme Court Rule 12.5.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Stored Communications Act, 18 U.S.C. §§ 2701–2712, and Title I of the Electronic Communications Privacy Act of 1986, 18

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[1] "Pet. App." refers to the Appendix accompanying the Petition for a Writ of Certiorari filed by City Defendants (No. 08-1332).

U.S.C. §§ 2510–2522 are reproduced in the Addendum to this cross-petition.

STATEMENT OF THE CASE

The City of Ontario subscribed to wireless text-messaging services provided by Arch Wireless[2] and issued government-owned paging devices to members of the Ontario Police Department SWAT team for official police business. The Ninth Circuit held that the City Defendants violated the Fourth Amendment when City officials obtained from Arch Wireless archived copies of messages that SWAT team members sent and received over those devices. The Ninth Circuit also held Arch Wireless liable under § 2702 of the Stored Communications Act for releasing the message contents to the City without first securing the consent of the individual SWAT team members who sent or received those messages. The Ninth Circuit erred on both accounts.

As the City Defendants explain in their petition, the Ninth Circuit's Fourth Amendment analysis conflicts with decisions of this Court and at least seven other circuit courts by applying a "less intrusive means" test and refusing to recognize the "special needs" that are present in the context of government employment. *See* City Defs.' Pet. 21–25. More fundamentally, the Ninth Circuit's categorical determination that all users of electronic communication services have a reasonable expectation of privacy in messages stored on a service

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[2] Arch Wireless Operating Company, Inc., the original defendant in this case, has since merged into Metrocall, Inc., which later became USA Mobility Wireless, Inc. For ease of reference, Cross-Petitioner continues to refer to "Arch Wireless" throughout this cross-petition.

provider's network disregards longstanding precedent of this Court requiring an evaluation of the particular circumstances of each case, creates a conflict with the Sixth Circuit, *see Warshak v. United States*, 532 F.3d 521, 527 (6th Cir. 2008) (en banc), and is out of step with the views of contemporary society. *See* City Defs.' Pet. 30–32.

If this Court decides to review the Fourth Amendment issues presented in the City Defendants' petition, then it should also grant this cross-petition and settle the meaning of the Stored Communications Act as applied to archived text messages. This statutory issue bears directly on the Fourth Amendment analysis and is an important issue in its own right. The Act sets two different rules for a service provider's voluntary disclosure of message contents, depending on whether the contents are (1) temporarily stored or backed up by the service provider to ensure transmission, or (2) maintained in long-term computer storage on the provider's network. The different standards reflect Congress's judgment that society does not reasonably expect that content stored indefinitely on a third party provider's servers will receive the same level of protection as content in temporary or backup storage incidental to transmission. The Ninth Circuit failed to recognize that vital distinction and, consequently, erred in holding that Arch Wireless violated the Act by disclosing archived message contents to a subscriber without the consent of the sender or recipient.

Statutory Background

Congress enacted the Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848, "to update and clarify Federal privacy

protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 99-541, at 1 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3555. Title II of the ECPA established the Stored Communications Act, which Congress designed "to protect privacy interests in personal and propriety information, while protecting the Government's legitimate law enforcement needs." *Id.* at 3, *as reprinted in* 1986 U.S.C.C.A.N. at 3557.

The Stored Communications Act focuses on the two predominant uses of computer networks at that time: "electronic communication services" and "remote computing services."[3] An "electronic communication service" includes "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). Congress recognized that it is often necessary for a service provider to make a temporary copy of an electronic communication as part of the transmission process, and it sought to provide the same level of privacy protection to this incidental storage as it provided to the underlying communication itself. The Act employs "electronic storage" as a (somewhat confusing) term of art to refer only to "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B)

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[3] As it was relatively uncommon in 1986 for individuals or even businesses to have computers capable of storing large amounts of data or performing complex data-processing tasks, many users (including banks and hospitals) would transmit their records to a third-party computing service, which would then retain the data for storage or processing. *See* S. Rep. No. 99-541, at 3, *as reprinted in* 1986 U.S.C.C.A.N. at 3557; Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1213–14 (2004).

any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17). The Act distinguishes "electronic storage" from all other forms of "computer storage" (including backup functions unrelated to the delivery of a message), which are encompassed within the definition of "remote computing services." *See id.* § 2711(2) (defining "remote computing services" as "the provision to the public of computer storage or processing services by means of an electronic communications system").

Section 2702 of the Act generally prohibits a provider of either service from voluntarily disclosing customer communications or records stored on the provider's network without consent. But the provisions governing *who* must consent to disclosure reflect Congress's judgment that disclosure of temporary copies created incident to the transmission itself raises greater privacy concerns. Indeed, some courts have held that unauthorized access of contents "in electronic storage" is functionally equivalent to interception of an electronic communication, which is prohibited under Title I of the ECPA as well as other state and federal law. *See generally* 18 U.S.C. §§ 2510–2522; *United States v. Councilman*, 418 F.3d 67, 85 (1st Cir. 2005) (en banc) (holding that interception of e-mail message "in electronic storage" violates Title I of ECPA).

Specifically, the Act states that a provider of electronic communication service "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service," 18 U.S.C. § 2702(a)(1), except "with the lawful consent of the *originator* or an addressee or *intended recipient* of such communication." *Id.* § 2702(b)(3)

(emphasis added).[4] A provider of remote computing service, which includes all other forms of computer storage and backup, *id.* § 2702(a)(2), need only obtain the consent of the "*subscriber.*" *Id.* § 2702(b)(3) (emphasis added). The statute permits any aggrieved party to recover damages for violations committed "with a knowing or intentional state of mind," and authorizes courts to award costs and attorneys fees, along with punitive damages for willful or intentional violations. *See id.* § 2707.

Factual Background[5]

Arch Wireless offers two-way text-messaging and other wireless communication services. The service generally works as follows: Arch Wireless receives a text message over its wireless network from a registered paging device and then enters that message into its computer network, where it is temporarily stored on a server.[6] Arch Wireless also makes an archived copy for long-term storage within its billing system. Arch Wireless then attempts to relay the message over its wireless network to the recipient's mobile device. The network will continue transmitting the message for up to 72 hours if the recipient is out of range or has turned off the device. Pet. App. 3. After that point, or

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[4] The statute provides a few other limited exceptions that are not applicable here. *See* 18 U.S.C. § 2702(b).

[5] Arch Wireless limits its discussion to facts that are pertinent to the plaintiffs' Stored Communications Act claims. The City Defendants provide additional details in their petition relevant to the Fourth Amendment issues. *See* City Defs.' Pet. 3–6.

[6] The two-way text-message paging devices offer similar service to text messaging that many wireless carriers offer on wireless "smart phones," such as Blackberries.

upon delivery, the message is deleted from temporary storage. Pet. App. 3–4.

Arch Wireless maintains an archived copy of text messages in its billing system because subscribers have contacted the company in the past to inquire about messages they may have missed or to verify billing statements. ER 169.[7] The archived copies can be accessed only by employees of Arch Wireless. ER 140. According to the company's policy in place during the timeframe at issue in this lawsuit, Arch Wireless would disclose message contents only to the subscriber or a properly designated contact person for the account. ER 148–49. Arch Wireless never released contents to a user of a particular device—in fact, it often cannot determine the user's identity, because many government, healthcare, and business subscribers allow many users to share a single device. ER 153.

In 2001, Arch Wireless contracted with the City of Ontario to provide two-way text-messaging services. Pet. App. 3. The City paid a flat monthly subscription rate for each device and was allotted 25,000 characters per device per month, with overage charges for exceeding that limit. Pet. App. 6. The City was the only subscriber under the contract. ER 437.

In October 2002, the City requested that Arch Wireless provide a transcript of text messages sent to and received on certain devices for audit purposes. Pet. App. 9. Arch Wireless confirmed that the City owned the devices, verified that the person making the request was the authorized contact person, and then provided the requested transcripts. Pet. App. 8–9.

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[7] "ER" refers to the Excerpts of Record filed with the Ninth Circuit.

Unbeknownst to Arch Wireless, Officer Jeff Quon apparently used one of the devices that the City audited. Pet. App. 54–55. The City's review of the transcripts revealed that Jeff Quon had sent sexually explicit text messages over the government-issued device to his wife, Jerilyn Quon, and to April Florio, a police dispatcher with whom he was having an affair. *Id.* Quon also sent numerous messages to Officer Steve Trujillo. Pet. App. 55.

Proceedings Below

Jeff Quon, Jerilyn Quon, April Florio, and Steve Trujillo filed a complaint in 2003 in federal district court against Arch Wireless and a number of City officials and entities. Pet. App. 10. The plaintiffs alleged, among other things, that Arch Wireless had violated § 2702 of the Stored Communications Act by releasing the contents of the text messages without obtaining Jeff Quon's consent.[8] ER 1–2.

On August 15, 2006, the district court granted summary judgment for Arch Wireless on the Stored Communications Act claim. Pet. App. 10. Based on the pleadings and record evidence, the district court found that the messages Arch Wireless archived were not in "electronic storage" because the long-term storage was not "incidental to the transmission of the communication itself, and [wa]s not meant for backup protection but apparently as the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism." Pet. App. 78. The court refused to adopt an "all or nothing" approach to characterize the services that Arch Wireless

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[8] The plaintiffs asserted that the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. ER 3.

provided to the City, recognizing that while the actual provision of text messaging qualified as "electronic communication service," the storage and retrieval of archived messages constituted "remote computing services." Pet. App. 80. Therefore, the consent of the subscriber—the City—"absolve[d] Arch Wireless of liability" under § 2703(b)(3). Pet. App. 63.

The plaintiffs appealed the district court's order to the Ninth Circuit, and on June 18, 2008, the panel reversed the district court's judgment with respect to the Stored Communications Act claims and ordered that judgment be granted in the plaintiffs' favor. Pet. App. 1, 21. Even though the plaintiffs never even argued that the archived contents were in "temporary, intermediate storage . . . incidental to the electronic transmission thereof," Pet. App. 15, and they conceded at oral argument that the archived messages "were not for backup purposes"[9] within the meaning of the Act, the panel somehow concluded that "it is clear that the messages were archived for 'backup protection.'" Pet. App. 19–20. The court ruled that, "[a]s a matter of law, Arch Wireless is an 'electronic communications service' that provided text messaging service via pagers to the Ontario Police Department." Pet. App. 39. It reasoned that because the text-messaging services that Arch Wireless provided the City qualified as a "electronic communication service," *any storage* by Arch Wireless must necessarily qualify as "electronic storage" under the Act. Pet. App. 19–20. Consequently, the panel ruled that Arch Wireless violated § 2702(a)(1) when it "knowingly turned over the text-messaging transcripts

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[9] *See* Audio Recording of Oral Argument at 5:33–5:45, *available at* http://tinyurl.com/07-55285-oa ("It is unknown why the messages are archived. They were not for backup purposes . . . .").

to the City, which was a 'subscriber,' not 'an addressee or intended recipient of such communications.'" Pet. App. 21.

Arch Wireless filed a timely petition for rehearing and rehearing en banc on July 9, 2008.[10] The Ninth Circuit issued an order denying rehearing or rehearing en banc on January 27, 2009. Pet. App. 124–25.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment issues that the Ontario defendants identify in their petition are cert-worthy and important, and this Court should grant review. And if it does, it should also consider the interrelated question this cross-petition presents: whether the Stored Communications Act, properly read, prohibits a service provider from revealing to a subscriber the contents of messages that are archived in connection with the subscriber's account. That issue of statutory interpretation not only informs the "reasonable expectation of privacy" analysis that this Court would inevitably have to perform, but it independently merits the Court's attention. Unless this Court intervenes, the Ninth Circuit's erroneous construction of the Act will impact thousands of service providers (and millions of subscribers and users) within the Ninth Circuit's jurisdiction. It will also severely constrain the government's ability to obtain contents of communications in furtherance of civil and criminal investigations.

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[10] The United States Internet Service Provider Association filed an amicus brief supporting Arch Wireless's petition. *See* Brief of Amicus Curiae United States Internet Service Provider Ass'n in Support of Petition for Rehearing and Rehearing en Banc of Appellee Arch Wireless Operating Co., *Quon v. Arch Wireless Operating Co.*, No. 07-55282 (9th Cir. July 22, 2008) (order denying reh'g and reh'g en banc) ("US ISPA Amicus Brief").

Electronic communications are ubiquitous and vital in today's society, yet the statutory and constitutional boundaries that apply to this medium remain largely unsettled. This case presents the Court an ideal opportunity to correct the Ninth Circuit's misguided understanding of the statutory framework while also resolving the Fourth Amendment issues that the City Defendants present.

I. THE NINTH CIRCUIT'S READING OF THE STORED COMMUNICATIONS ACT IS INCORRECT AND UNWORKABLE

The Stored Communications Act provides different rules to govern a service provider's voluntary disclosure of message contents in "electronic storage" as compared to other computer storage provided in connection with a "remote computing service." If a provider temporarily stores or backs up a message as part of the transmission process, *see* 18 U.S.C. § 2510(17), then the message is "in electronic storage," and the provider must obtain the sender's or recipient's consent before disclosing the contents. *See id.* § 2702(a)(1), (b)(3). All other computer storage falls within the definition of a "remote computing service," *see id.* § 2711(2), in which case the provider needs only the subscriber's consent. *See* § 2702(b)(3).

Other provisions of the Act follow the same pattern, affording less privacy protection for ordinary computer storage as compared to messages "in electronic storage" (by which the statute really means "storage incidental to transmission"). For instance, § 2701 provides criminal penalties for accessing a service provider's network without authorization and obtaining an electronic communication "while it is in electronic storage in such system." 18 U.S.C. § 2701(a). There is

no similar criminal provision addressing unauthorized access of content stored in connection with "remote computing services." Section 2703 requires the government to obtain a search warrant to compel disclosure of contents in "electronic storage" for less than 180 days, whereas the government may use an administrative subpoena or court order to obtain contents stored in connection with a "remote computing service" or contents "in electronic storage" for longer than 180 days. 18 U.S.C. § 2703(a), (b).[11]

The Ninth Circuit recognized that different rules applied to providers of "remote computing services" and providers of "electronic communication services," *see* Pet. App. 14, but it incorrectly assumed that a provider may have only one classification for all of the services it provides, at all times. The court mistakenly reasoned that because Arch Wireless provided the underlying transmission of the text messages, it must be an "electronic communication service" for all purposes, and any storage provided by Arch Wireless must be "electronic storage," regardless of whether the storage was incidental to transmission. Pet. App. 16.

The Ninth Circuit's holding is impossible to square with the statutory text. As the terms "electronic communication *service*" and "remote computing *service*" themselves make clear, these concepts apply to specific services, not to any blanket characterization of the *provider*. The specific context is critical in determining

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[11] It might seem odd that a message could remain in "temporary" storage for such a long period, but that scenario could easily arise. For instance, an e-mail user might check an account infrequently, in which case any pending messages would remain "in electronic storage" on the service provider's network until the recipient actually retrieves those messages.

the statutory classification. An entity may provide "electronic communication services" in some contexts and "remote computing services" in others, even with respect to the same message—the proper classification entirely depends on the purpose of storage at a specific point in time. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1215 (2004) (observing that "most network service providers are multifunctional," and the statutory classification is "context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract"). A provider of electronic communication services retains that classification only to the extent it temporarily copies or backs up a message in order to facilitate transmission; all other storage services it provides are classified as "remote computing services."

The legislative history confirms that a provider of remote computing services "may also provide electronic communication services," S. Rep. No. 99-541, at 14, *as reprinted in* 1986 U.S.C.C.A.N. at 3568, and that different aspects of the same communication may be entitled to different treatment under the Act. A House Report accompanying the bill observed, for instance, that "[s]ometimes the addressee, having requested and received a message, chooses to leave it in storage on the service for re-access at a later time." H.R. Rep. No. 99-647, at 65 (1986). Such communication, the Report explained, "should continue to be covered by section 2702(a)(2)"—the provision addressing remote computing services. *Id.*

Congress's apparent belief that information temporarily stored incident to transmission itself is more private or sensitive than long-term archives may have

been inspired by (or an effort to accommodate) the Fourth Amendment principles as articulated by this Court. Specifically, this Court has long recognized that a party maintains no expectation of privacy over information voluntarily provided to a third party, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984). At the same time, however, this Court has repeatedly held that the government may not eavesdrop on a phone call or open a sealed package in the mail—even though those methods of communication similarly involve providing information to a third party. *See, e.g., Katz v. United States*, 389 U.S. 347, 352 (1967); *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Congress likely made the judgment that a service provider should be treated as a carrier (much like the post office or telephone company) when it provides an electronic communication service and stores contents incident to the transmission of the message, but that a provider is more like a traditional third party when it simply maintains contents in long-term storage.

The distinction between "electronic storage" and other "computer storage" may be somewhat confusing, particularly because long-term storage archives are often referred to as "backup" copies in the everyday use of that term. In the context of the Act, however, it is clear that Congress intended the phrase "for purposes of backup protection of such communication" to be construed more narrowly to encompass only backup copies made to ensure transmission of the message. A broader reading of "backup" makes no sense in the overall structure of the statute, because all

"computer storage" maintained by the provider of electronic communication services would then qualify as "electronic storage" within the meaning of § 2510(17), effectively collapsing the two categories of services and eliminating the less stringent standards that apply to "remote computing services." The legislative history validates the narrower construction. The House Report explained that the purpose of "[b]ackup protection" is to "preserve[] the integrity of the electronic communications system and to some extent preserve[] the property of the users of such a system," and to the extent a message is stored longer than necessary to ensure transmission, "it is closer to a regular business record maintained by a third party, and, therefore, deserving of a different standard of protection." H.R. Rep. No. 99-647, at 68.

DOJ has adopted the view that "electronic storage" refers only to storage that is incidental or related to transmission of the communication. For example, in a DOJ manual addressing the search and seizure of computers and stored communications, DOJ states that an e-mail stored on a network after the recipient has retrieved and viewed the message "is no longer in 'electronic storage'" but is "simply a remotely stored file," because "the process of transmission to the intended recipient has been completed."[12] And in an amicus brief filed in another Ninth Circuit case, DOJ argued that reading 'electronic storage' too broadly "effectively obliterates the [Act's] essential distinction" between "electronic storage" and other computer

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[12] U.S. DOJ, Computer Crime & Intellectual Prop. Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* § II.B (2002), *available at* http:// www.usdoj.gov/criminal/cybercrime/s&smanual2002.htm.

storage maintained in connection with "remote computing service."[13] Professor Orin Kerr agrees: He explained that the "traditional understanding has been that a copy of [an] opened e-mail sitting on a server is protected" only by the remote computing service rules because "that copy is no longer 'incident to transmission' nor a backup copy of a file that is incident to transmission; rather, it is just in remote storage like any other file held by" a provider of remote computing service. Kerr, *A User's Guide to the Stored Communications Act*, 72 Geo. Wash. L. Rev. at 1216.

Arch Wireless unquestionably acts as an "electronic communication service" provider when it transmits text messages over its network, and its temporary storage of contents in connection with the transmission process constitutes "electronic storage." But that aspect of its services is not at issue. The plaintiffs allege that Arch Wireless violated the Stored Communications Act by divulging to the City the contents of messages that were retrieved from its long-term archives—long after the messages were delivered and the temporary storage was deleted. The sole question is whether the archived messages stored in its billing system were "in electronic storage" when they were disclosed. *See* 18 U.S.C. § 2702(a). The plaintiffs have never argued that this storage was "incidental to the electronic transmission," and they conceded at oral argument that the storage was not for backup

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[13] Brief for the United States as Amicus Curiae Supporting Defendant/Appellee's Petition for Rehearing and Suggestion for Rehearing en Banc at 11, *Theofel v. Farey Jones*, No. 02-15742 (9th Cir. Sept. 25, 2003).

purposes.[14] That concession is plainly correct. Individual users had no access to content archived in long-term storage, and even if they had access, the archived messages could not have been used to retransmit the original communication because they were stored in a completely different form than the original message. Arch Wireless maintained a copy of the text message contents for purposes completely unrelated to the transmission of the original message; specifically, Arch Wireless periodically responded to subscribers' questions about billing statements or missed messages. ER 169.

Because there is no legitimate dispute that the archived messages were no longer "in electronic storage" when Arch Wireless provided them to the City, the company cannot be liable under the Act. The Ninth Circuit's holding that, "[a]s a matter of law, Arch Wireless is an 'electronic communication service'" makes no sense, disregards the undisputed facts, and is a plain misreading of the statute. Pet. App. 39.

II. THE MEANING OF THE STORED COMMUNICATIONS ACT IMPACTS THE FOURTH AMENDMENT ANALYSIS

This Court should review the Ninth Circuit's erroneous construction of the Stored Communications Act alongside the Fourth Amendment issues that the City Defendants present in their petition. Review of this statutory issue would not require any additional analysis beyond the Fourth Amendment issues, and this case presents an ideal opportunity for the Court to

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[14] *See* Audio Recording of Oral Argument at 5:33–5:45, *available at* http://tinyurl.com/07-55285-oa ("It is unknown why the messages are archived. They were not for backup purposes . . . .").

correct the Ninth Circuit's misguided understanding of the statutory framework. This Court invariably will confront the meaning of the Stored Communications Act in determining whether the plaintiffs actually have a "reasonable expectation of privacy" in the contents of text messages stored on a third party's servers, as they have alleged. The Ninth Circuit's analysis altogether disregards the considered judgment of Congress that messages in long-term storage deserve less privacy protection than messages that are stored or backed up temporarily in connection with the transmission process, and that error likely clouded the Ninth Circuit's Fourth Amendment analysis.

Modern Fourth Amendment analysis usually begins with *Katz v. United States*, in which Justice Harlan first articulated the "reasonable expectation of privacy" test. *See* 389 U.S. at 360 (Harlan, J., concurring). He wrote that, in order for the Fourth Amendment to protect an individual from an unwanted government intrusion, the person must first demonstrate "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. This Court has conducted a searching inquiry into all relevant factors, including "the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government intrusion." *Oliver v. United States*, 466 U.S. 170, 178 (1984) (citations omitted).

Although no single factor resolves whether an expectation of privacy is reasonable in all cases, the rights afforded by positive law are and always have been an important factor in the calculus. In *Rakas v.*

Illinois, for instance, the Court observed that even after *Katz*, the "[l]egitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." 439 U.S. 128, 143 n.12 (1978).[15] In *Oliver v. United States*, the Court recognized that the existence of a property right remains an "element in determining whether expectations of privacy are legitimate," although that fact alone is not always sufficient to establish a legitimate expectation of privacy (and was not sufficient in that case). *Oliver*, 466 U.S. at 183.[16] And in *Florida v. Riley*, the plurality determined that helicopter surveillance at low altitude did not violate the Fourth Amendment, in part because "the helicopter in this case was *not* violating the law." 488 U.S. 445, 451 (1989).[17]

In conducting the thorough analysis that *Katz* demands, this Court will take into account the lines that Congress has already drawn that clearly impact

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[15] *See also* 439 U.S. at 153 (Powell, J., concurring) ("[A]s the Court states today, property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable.").

[16] *See also* 466 U.S. at 189 (Marshall, J., dissenting) ("As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy . . . is 'reasonable,'" including "whether the expectation at issue is rooted in entitlements defined by positive law.").

[17] For additional cases and a more extensive discussion of the Court's use of positive law in Fourth Amendment analysis, *see generally* Daniel B. Yeager, *Search, Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. Crim. L. & Criminology 249 (1993); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 Stan. L. Rev. 503 (2007).

the Fourth Amendment issues presented in this case. The Stored Communications Act reflects Congress's judgment concerning the extent to which electronic messages archived in long-term storage on a provider's network should be protected from disclosure. *See* S. Rep. No. 99-541, at 5, *as reprinted in* 1986 U.S.C.C.A.N. at 3559 ("The Committee believes that [the ECPA] represents a fair balance between the privacy expectations of American citizens and the legitimate needs of law enforcement agencies."). This Court might ultimately conclude that this statutory framework does not, by itself, provide a sufficient basis to resolve the Fourth Amendment issue, but it clearly informs the analysis.

The statutory issues presented in this cross-petition will not require additional analysis beyond the constitutional analysis, and, as explained below, the Ninth Circuit's erroneous construction of the statute has significant, far-reaching consequences aside from its bearing on the Fourth Amendment analysis. Thus, if the Court decides to resolve the Fourth Amendment issues the City Defendants present, the Court should also settle the meaning of the statute as applied to the facts of this case.

III. THE COURT SHOULD SETTLE THIS IMPORTANT ISSUE OF FEDERAL LAW

The impact of the Ninth Circuit's ruling is not limited to the parties in this case, or even to other providers of two-way text messaging services. It affects all electronic communication service providers, including Internet service providers, wireless phone companies, and many others. Many of the world's leading providers of computing and online services are located within the Ninth Circuit. They and their

customers are all directly affected by this decision. The Ninth Circuit's ruling will have a host of unintended consequences if it remains the law, while generating no significant benefit to privacy interests.

Under the Ninth Circuit's analysis, any storage maintained by a provider of electronic communications constitutes "electronic storage," and providers must therefore secure the consent of senders and recipients before they can reveal such content to the subscriber of the service. For many providers that retain messages in long-term storage, including Arch Wireless, it likely would be impossible to implement a disclosure policy that complies with the Ninth Circuit's decision.

As the United States Internet Service Provider Association ("US ISPA") explained in its amicus brief in support of rehearing and rehearing en banc, many services allow families and businesses to share a single account.[18] In addition, hospitals, police departments, and other commercial and government employers often assign a wireless device to whomever is working a particular shift, rather than dedicating the device for an individual employee's exclusive use. Accordingly, it is impossible in many cases for the provider to ascertain who sent a particular message. Yet subscribers normally expect to have control and access over all aspects of their account, including access to any e-mails and other messages sent by other users. The Ninth Circuit's ruling would significantly frustrate that expectation. As the US ISPA observed, the Ninth Circuit's decision would cause subscribers to "lose significant control over how the service is being used, especially in connection with the stored communi-

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[18] *See* US ISPA Amicus Brief at 6.

cations of shared or sub-account holders or other informal users" of the service.[19]

The Ninth Circuit's decision also undermines an employer's ability to rely on an official policy stating that employees have no privacy interest in e-mails and text messages sent using company-provided devices. If the unofficial actions of a single supervisor can negate that policy—and thereby subject the service provider to significant liability risks—then many providers will conclude that the subscriber's consent is no longer adequate to warrant disclosure. As a result, Arch Wireless and other providers may be forced to stop archiving messages altogether, even though many subscribers demand such features to verify aspects of their bills and for other legitimate reasons. Even where a service provider could identify the particular sender or recipient of a message, the Ninth Circuit's ruling will impose considerable administrative costs and would force providers into a potentially adversarial relationship with their subscribers.

The Ninth Circuit's overbroad construction of "electronic storage" also casts confusion over the compulsory disclosure provisions of the Stored Communications Act and upsets the careful balance that Congress struck between privacy interests and law enforcement needs. The Act expressly authorizes law enforcement to obtain contents in long-term storage with an administrative subpoena, *see* 18 U.S.C. § 2703(b), but the Ninth Circuit's construction would require law enforcement to obtain a warrant before accessing any such information, severely limiting their ability to carry out civil and criminal investigations.

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[19] US ISPA Amicus Brief at 6.

For instance, the Government would have a far more difficult time accessing e-mails and text messages stored on providers' servers, even long after those messages have been received and read. And of course if service providers altogether stop archiving electronic messages as a consequence of the Ninth Circuit's ruling, then law enforcement will be unable to access such information under any circumstances—even with a warrant. Quite plainly, electronic communications are critically important in today's society, and the Ninth Circuit's ruling will deal a significant blow to law enforcement efforts.

CONCLUSION

For the reasons set forth above, if this Court grants review of the Fourth Amendment issues presented in the City Defendants' petition, then it should also grant this cross-petition and review the question USA Mobility Wireless, Inc. presents.

Respectfully submitted,

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18 U.S.C. § 2510 (17)

§ 2510. Definitions

As used in this chapter—

* * *

(17) "electronic storage" means—

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

* * *

18 U.S.C. § 2702

§ 2702. Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such

service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.—A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032);

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub. L. 108-21, title V, § 508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

* * *

18 U.S.C. § 2711

§ 2711. Definitions for chapter

As used in this chapter—

(1) the terms defined in section 2510 of this title have, respectively, the definitions given such terms in that section;

(2) the term "remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system;

(3) the term "court of competent jurisdiction" has the meaning assigned by section 3127, and includes any Federal court within that definition, without geographic limitation; and

(4) the term "governmental entity" means a department or agency of the United States or any State or political subdivision thereof.

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(3) (3)

Nos. 08-1332 & 08-1472

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF ONTARIO,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, et al.,

Respondents.

USA MOBILITY WIRELESS, INC.,

Petitioner,

v.

JERILYN QUON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEFF QUON, ET AL.

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QUESTIONS PRESENTED BY ONTARIO'S PETITION

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has no formal no-privacy policy pertaining to text message transmissions and the operational realities of the police department are such that SWAT team members are explicitly told their messages would remain private if they paid any additional overage charges.

2. Whether Petitioner Ontario fails to show a true conflict among the various circuits worthy of this Court's review, especially when the Ninth Circuit did not utilize a "less intrusive means" analysis and specifically stated so.

3. Whether employees who send text messages to other employees' pagers have a reasonable expectation of privacy in those messages, when the employees are each aware that the employer has a policy of not reviewing the text messages.

QUESTIONS PRESENTED BY ARCH WIRELESS' PETITION

1. Whether Arch Wireless has failed to preserve for review its argument that it is a dual provider.

2. Whether Arch Wireless is properly considered an "electronic communication service" – defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications" – when it contracted with Ontario to allow SWAT team members to send or receive electronic text messages.

PARTIES TO THE PROCEEDINGS

Petitioners (Defendants and appellees below):

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF

ARCH WIRELESS OPERATING COMPANY, INCORPORATED (listed on petition as USA Mobility Wireless, Inc.)

DOREEN KLEIN

Respondents (Plaintiffs and appellants below):

JERILYN QUON, APRIL FLORIO, JEFF QUON, STEVE TRUJILLO, and DEBBIE GLENN

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INTRODUCTION

The appellate decision below arose out of litigation brought by Jerilyn Quon, April Florio, Jeff Quon, and Steve Trujillo (collectively "Plaintiffs") against the City of Ontario (their employer) and Arch Wireless Operating Company ("Arch Wireless").[1]

With respect to the City of Ontario, Plaintiffs allege that the City, its Police Department and its Chief of Police, Lloyd Scharf (collectively "Ontario"), violated their Fourth Amendment rights by requesting from Arch Wireless and reviewing private text messages transmitted via City-owned pagers. With respect to Arch Wireless, Plaintiffs allege that Arch violated the Stored Communications Act ("SCA") by divulging to Ontario the text messages.

The appellate decision held that Ontario's unique practice of allowing employees to maintain their privacy by not reviewing the text messages in exchange for payment by the employee of any overage charges created a reasonable expectation of privacy. Both the trial court and the appellate court below found that this reimbursement policy was in fact the "operational reality" within Ontario and expressly provided the Plaintiffs with an expectation of privacy. Furthermore, the appellate decision held that the search was justified at its inception, but was

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[1] Arch Wireless later merged and became USA Mobility Wireless, Inc. For ease of reference, Plaintiffs will refer to Arch Wireless in this brief.

unreasonable in its scope. Accordingly, the appellate decision below concluded that Ontario violated the Plaintiffs' Fourth Amendment rights.

With regard to Arch Wireless, the appellate decision reviewed the plain language of the SCA as well as its rather unambiguous legislative history and found that Arch Wireless' services were properly considered an "electronic communication service" under the SCA. Since Arch Wireless provided an electronic communication service, it could not lawfully disclose the text messages without permission of an "addressee or intended recipient." Accordingly, the appellate decision below concluded that Arch violated the SCA.

Ontario filed a Petition for a Writ of Certiorari, while Arch Wireless filed a Conditional Cross-Petition for a Writ of Certiorari. However, neither Petitioner has presented any "compelling reasons" in support of their Petitions. *See* Sup. Ct. R. 10.

Ontario attempts to inflate their cause by suggesting that the appellate decision creates a split in circuits by utilizing a "less intrusive means" analysis. This argument, however, is belied by the plain language of the appellate decision as well as the panel's opinion in denying Ontario's rehearing petition. The appellate decision itself carefully applies the correct legal standard. Any lingering doubt was dispelled in the panel's opinion where the decision author, Judge Wardlaw, unambiguously stated that the panel did not apply a "less intrusive means" analysis.

Next, Ontario argues that the appellate decision is erroneous because it hinges Plaintiffs' expectation of privacy entirely upon Ontario's unique practice of not reviewing text messages in exchange for payment of the overages. Ontario claims that in reaching this conclusion, the Ninth Circuit undermined the "operational realities of the workplace" standard. However, the appellate decision does just the opposite. The appellate decision reflects a careful consideration of the working environment and operational realities that exist within Ontario Police Department. Ignoring Ontario's unique practice, as Ontario suggests, would be to ignore the operational realities standard altogether.

Ontario's final claim is that the appellate decision expands Fourth Amendment protection beyond reasonable limits. Like the others, Ontario attempts to breathe life into their cause by exaggerating the issue. The decision does not expand constitutional protections and involves four employees of Ontario Police Department who were each aware of Ontario's unique practice of keeping text messages private. In practical terms, the decision is insignificant since it is based entirely on Ontario's own unique practice, and one that most employers would not embrace.

Arch Wireless' Petition is even more tenuous. Arch Wireless argues the appellate decision is erroneous because it applied a categorical approach when examining Arch Wireless' service. However, Arch Wireless invited both the District Court and the

Ninth Circuit to apply such an approach and has not preserved the issue for review.

Simply put, Ontario and Arch Wireless have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant their Petitions. Accordingly, the Petitions should be denied.

STATEMENT OF THE CASE

In 2001, Arch Wireless contracted to *provide wireless text-messaging services* for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Jeff Quon and Steve Trujillo, who were employed as police sergeants. Opinion, App. 3.[2]

Ontario had no official no-privacy policy directed to text-messaging by use of the pagers. However, it did have a general policy about computer and internet usage that indicated Ontario reserved the right to monitor email and internet usage. In 2000, before Ontario acquired the pagers, Trujillo and Quon signed an acknowledgment form indicating they were aware of this policy. Opinion, App. 4.

[2] All references to "App." shall refer to Ontario's appendix.

Two years after signing the acknowledgement form, Quon attended a meeting during which Lieutenant Steve Duke informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy. Opinion, App. 5.

Although Ontario had no official policy expressly governing use of the pagers, it did have an informal policy governing their use. Under Ontario's contract with Arch Wireless, each pager was allotted 25,000 characters, after which Ontario was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' " Opinion, App. 6.

The informal policy allowed officers to maintain their privacy in their text messages as long as they paid the overage charges. Sergeant Quon testified that Lieutenant Duke would tell him that "if you don't want us to read it, pay the overage fee." Per the policy, Quon went over the monthly character limit

"three or four times" and paid Ontario for the overages. Opinion, App. 8.

In August 2002, Quon and another officer again exceeded the 25,000 character limit and Lieutenant Duke let it be known at a meeting that he was "tired of being a bill collector." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." Opinion, App. 8.

Ontario was not able to access the text messages themselves. Instead, they contacted Arch Wireless who voluntarily disclosed the transcripts to Ontario without notifying Plaintiffs. Opinion, App. 9.

REASONS FOR DENYING ONTARIO'S PETITION

Ontario does its best to inflate this case into one creating a split in circuits and a "startling extension of Fourth Amendment privacy rights." *See* Ontario Pet. 15. However, this case involves nothing of the sort.

Contrary to Ontario's claim, the appellate decision makes clear that it did not adopt a "less intrusive means" analysis. Furthermore, the decision is a rather straightforward application of the factors espoused in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In fact, the decision itself is entirely dependent upon Ontario's self-initiated practice of allowing employees

to maintain their privacy. Quite candidly, the appellate decision acknowledged that Ontario was its own worst enemy.

I. The Ninth Circuit Did Not Adopt A "Less Intrusive Means" Test And Did Not Create A Split In The Circuits.

Ontario claims that the appellate decision below creates a split in the circuits and departs from Supreme Court precedent by applying a "less intrusive means" test. The court, however, never adopted a less intrusive means test, and the author of the panel opinion explicitly disclaimed doing so. Ontario's argument stems entirely from the court's citation to *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), and is a desperate attempt to blow life into its petition.

Ontario spends time and ink explaining how this Court has cautioned against the use of the "less intrusive means" test, but completely fails to demonstrate that the appellate decision below did use such a test.

In fact, Ontario made the exact same argument it makes here to the Ninth Circuit in its Petition for Panel Rehearing and Rehearing En Banc. In denying the Petition for Panel Rehearing, the panel responded as follows:

> We did not adopt a "less intrusive means" test. [citation omitted]. The "less intrusive

means" discussion relates to the jury's finding that Chief Scharf conducted the search for noninvestigatory purposes. *O'Connor* provides the framework for evaluating the reasonableness of a search in this context, which the dissent does not dispute. [citation omitted]. Applying this framework, we first held that the search was reasonable "at its inception" because the officers conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as the jury had found below. *Quon*, 529 F.3d at 908. We then turned to the second prong of the *O'Connor* test: determining whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 480 U.S. at 726, 107 S.Ct. 1492 (internal quotation marks omitted). Because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," we held that the search "was excessively intrusive in light of the noninvestigatory object of the search." *Quon*, 529 F.3d at 909. This holding was also based on our conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest – again, as found by the jury – in auditing the messages. *Id.*

The dissent incorrectly represents that we held that the search was unreasonable "*because* the city could have used less

> intrusive means to accomplish the objectives of the search." [citation omitted] (emphasis added). Although we cited *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), we did not apply a "less intrusive means" test. *Quon*, 529 F.3d at 908-09; cf. Dissent at 777-78 (conceding that "the panel does not explicitly state it is applying a least restrictive means test"). We mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate our conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Quon*, 529 F.3d at 909.

Finally, the panel explained that it "only considered *Schowengerdt* to the extent necessary to consider the district court's decision." *See* Opinion, App. 134 fn.1. That the authors of the opinion expressly state that their opinion did not utilize the "least intrusive means" test should dispel the Petitioner's claim.

Furthermore, Ontario's argument places form over substance. The appellate decision could have just as easily not included the citation to *Schowengerdt*, and the holding would not change. The decision clearly identifies that it is assessing whether the measures Ontario took were reasonably related to the objectives of the search and were not excessively intrusive. The Ninth Circuit correctly examined whether "the depth of the inquiry or extent of the

seizure exceeded that necessary for the government's legitimate purposes." Opinion, App. 35. The Ninth Circuit did not automatically find the search unreasonable based merely on the existence of less intrusive means, but rather because the means that were used were excessive and unreasonable in light of the relatively insignificant need for the information. The Ninth Circuit applied the proper analysis and reached an appropriate decision based upon all of the circumstances. Since the Ninth Circuit did not utilize a "less intrusive means," no split among the circuits was created and review is not necessary.

II. The Ninth Circuit's Ruling That Ontario Created A Reasonable Expectation Of Privacy Does Not Warrant Review By This Court.

Ontario seeks review by this Court simply because it is unhappy with the appellate decision below. In support, Ontario offers no significant legal or factual argument, and in no way attempts to demonstrate that review is appropriate under Rule 10 of the Rules of the Supreme Court.

In essence, Ontario feels that Lieutenant Duke should not be able to establish an expectation of privacy among the officers he oversees. More than that, Ontario suggests that both the District Court and the Ninth Circuit erred when they even considered Lieutenant Duke's policy when examining whether there was an expectation of privacy.

However, both the District Court and the Ninth Circuit properly applied the *O'Connor* test, recognizing:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use. Opinion, App. 30.

Even Ontario concedes "[t]o that point, the panel's reasoning is a straightforward application of *O'Connor's* 'operational realities of the workplace' standard." *See* Ontario Pet. 16. In other words, the Ninth Circuit applied the appropriate reasoning, but simply reached an unfavorable result.

Ontario is asking this Court to review and conclude as a matter of law that the actions of a high-ranking official within a police department should not be considered when evaluating the "operational realities of a workplace." However, the notion presented by Ontario in and of itself erodes the very standard they profess to be supporting. *O'Connor* makes clear that analyzing an expectation of privacy involves an in-depth factual inquiry, and that actual office practices or procedures may affect one's expectation of privacy. The District Court and the Ninth Circuit did

just that, and Ontario simply disagrees with the outcome.

Furthermore, the inquiry here is predicated upon a unique set of facts that presents no important constitutional question and no other basis for review by this Court. Ontario had no official policy with regard to the use of text-message pagers. The only mention of text-messages was at a meeting where Ontario informed only those employees in attendance that the e-mail policy applied to the text-message pagers. Ontario did not bother to publicly notify anyone, or even send out a written policy. Quon had no recollection of that being discussed at the meeting.[3] Opinion, App. 5-6. Thus, the City's actions, which include Lieutenant Duke's policy, each contributed to the finding of a reasonable expectation of privacy.

In *O'Connor*, this Court mandated a "'case-by-case' approach to determining whether an employee has a reasonable expectation of privacy in the workplace." *O'Connor*, 480 U.S. at 718. The appellate decision below follows this Court's instruction that "public employer intrusions on the constitutionally protected privacy interests of government employees

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[3] Essentially, Ontario is advocating for a "per se rule" that employees may never have privacy in their workplace pagers. Such a rule would require courts to ignore the fact that Ontario had no written workplace policy on pagers and the day-to-day practice that officers would retain their privacy as long as they paid the overages. Ontario's per se rule would eviscerate the "operational realities" standard.

. . . should be judged by the standard of reasonableness *under all the circumstances*." *Id.* at 725-26. As such, the ruling below does not merit review by this Court.

III. The Ninth Circuit's Opinion Is Consistent With This Court's Precedent

Ontario further argues that review is warranted based upon the Ninth Circuit's conclusion that Trujillo, Florio and Jerilyn Quon maintained an expectation of privacy in the text-messages sent to Jeff Quon on his Department-issued pager. The argument is that it is not objectively reasonable to expect privacy in text-messages sent to someone else's workplace pager, despite the unique circumstances.

Ontario offers no legal or factual support that the appellate decision is erroneous. Without citing any authority, Ontario claims "[i]t is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager." Ontario Pet. 30. However, the Ninth Circuit's decision reflects a rather straightforward analysis of the facts of this case with this Court's prior decisions. Moreover, the decision itself does not expand rights.

Ontario concedes that the appellate decision properly analogized text-messages to telephone calls, regular mail, and e-mail, but simply reached the wrong result. Ontario's entire claim is that in order for Trujillo, Florio and Jerilyn Quon's expectation of privacy to be objectively reasonable, "the sender

would have to believe the recipient's employer does *not* have a no-privacy policy in place. . . ." Ontario Pet. 30.

In passing, Ontario asserts that the Ninth Circuit expressly did not rely upon Lieutenant Duke's informal policy when reaching its conclusion as to Trujillo, Florio and Jerilyn Quon. This claim is overstated. The appellate decision makes clear, and Ontario concedes, that Trujillo was a SWAT team member, subject to Lieutenant Duke's informal policy. Since Trujillo was also subject to and aware of the privacy policy, the analysis with respect to Trujillo would be the same as it is with Quon.

Furthermore, the undisputed evidence provided by Florio and Jerilyn Quon in their declarations is that they had no reason to believe that the Department would review the messages they sent Quon. This understanding was based upon Lieutenant Duke's informal policy. In fact, both the District Court and the Ninth Circuit acknowledged that "Lieutenant Duke made it clear *to the staff*, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages." Opinion, App. 30. Florio and Jerilyn Quon were staff.

Thus, Ontario's concerns about the breadth of the appellate decision are unfounded. This is not a case that involves a private individual sending a text message to a public employee and expecting privacy. The Plaintiffs are public employees working for Ontario who maintained an expectation of privacy

based upon Lieutenant Duke's informal policy. Ontario's attempt to exaggerate the issue into one that "extends Fourth Amendment protection" is unavailing. Ontario Pet. 28.

Since the Plaintiffs did in fact have a belief that their text messages would remain private, by Ontario's own argument, the Plaintiffs' expectation of privacy would be reasonable.

Finally, the Ninth Circuit's decision is further based upon its conclusion that the Plaintiffs maintained an expectation of privacy under the Stored Communications Act, found at 18 U.S.C. §§ 2701-2711. The appellate decision concludes "[a]s a matter of law, Trujillo, Florio and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." Opinion, App. 28-29.

As will be explained further below, the Ninth Circuit's decision with regard to the Stored Communications Act is correct. The fact that the Plaintiffs' text messages were protected from disclosure under the Stored Communications Act served as a legal basis for the Plaintiffs to objectively believe that their text messages would remain private. Since Ontario has failed to address the appellate decision on this point, they cannot successfully argue that the Ninth Circuit was erroneous and that review is warranted.

REASONS TO DENY ARCH WIRELESS' CONDITIONAL CROSS-PETITION

Arch Wireless has not presented a compelling reason for this Court to grant review. Arch Wireless chose not to file its own petition, and only filed this conditional cross-petition on the 30th day after Ontario filed its own petition. Furthermore, in Ontario's petition, it did not argue that the Ninth Circuit erred in its ruling against Arch Wireless. In fact, the petition is utterly silent as to that claim. Attempting an end-around, Arch Wireless now claims that the appellate decision is wrong with respect to the SCA and warrants review.

Arch Wireless' primary argument in support of review is that the Ninth Circuit's interpretation of the SCA is "incorrect and unworkable." *See* Arch Wireless Pet. 11. More specifically, Arch Wireless argues that the Ninth Circuit improperly applied an "all-or-nothing" approach in determining whether Arch Wireless was a provider of an "electronic communications service" ("ECS") or a "remote computing service" ("RCS"). Arch Wireless claims that the Ninth Circuit erroneously failed to consider that it could be providing a dual service. In addition, Arch Wireless argues that the Ninth Circuit erred by "automatically" concluding that Arch Wireless stored messages for purposes of backup protection simply because it was an ECS provider. Arch Wireless' claims are simply disingenuous.

Arch Wireless fails to inform this Court that it was Arch Wireless itself who has maintained from the beginning that it was solely a RCS. The revelation that it now provided a "dual service" was never suggested until after the Ninth Circuit issued its opinion and Arch Wireless submitted its petition for rehearing. In fact, it was Arch Wireless who asked both the District Court and the Ninth Circuit to apply a so-called "all or nothing" approach. To claim that the Ninth Circuit erred by applying the approach Arch Wireless suggested does not merit review.

More importantly, the panel did not apply such a rigid approach. Rather, the panel decision reflects a thorough analysis of the service Arch Wireless provided and an appropriate conclusion. Arch Wireless is clearly an ECS based upon the plain language of the statute. Arch Wireless clearly stores messages for backup protection based upon the undisputed evidence that they, among other things, "archive" messages for "recordkeeping purposes." The panel reached this conclusion based upon the evidence.

I. Arch Wireless' Claim That The Ninth Circuit Applied An "All Or Nothing" Approach Is Unavailing.

Arch Wireless' primary argument in support of review is that the Ninth Circuit "incorrectly assumed that a provider may have only one classification for all of the services it provides, at all times." *See* Arch

Wireless Pet. 12. Arch Wireless argues "[t]he court mistakenly reasoned that because Arch Wireless provided the underlying transmission of the text messages, it must be an 'electronic communication service' for all purposes. . . ." *See* Arch Wireless Pet. 12.

Nothing could be further from the truth.

The record is relatively clear that it was Arch Wireless who took the position from the outset that it provided a RCS "for the services it provides, at all times." Arch Wireless argued and proved that it provided a RCS exclusively. Not once did Arch Wireless ever suggest to the District Court that it provided a dual service, or that certain aspects of its service could be an ECS while others could be a RCS. Instead, Arch Wireless maintained it provided a RCS and could release the text messages to Ontario as a subscriber.

In its ruling at summary judgment, the District Court (who ultimately sided with Arch Wireless) correctly identified the inquiry:

> What is disputed is whether the service provided by Arch Wireless – that is, of being able to retrieve for its subscribers text messages held in long-term electronic storage on its computers that have been sent over its communication network – constitutes a remote computing service or is more properly characterized as an electronic communication service. If the former, then the City's consent would serve to absolve Arch Wireless of liability as it was the subscriber to the

> service. If the latter, then the City's consent is to no avail as only the consent of the originator or intended recipient of such a message (in this case, the plaintiffs themselves) would suffice for the exemption to apply. *See* Ontario Pet. App. 63.

Then, the District Court went on to make the very point Arch Wireless attempts to make now:

> This leads to another point that neither side in this case acknowledges – that Congress recognized that service providers can offer a wide variety of different services, each one being characters differently under the statute. . . . *See* Ontario Pet. App. 79.

With that in mind, the District Court noted that Arch Wireless took the position that it was either solely an ECS or a RCS:

> The parties in this case apparently take an 'all or nothing' approach in how to characterize what Arch Wireless provided to the City – either the provision of text-messaging pager/transcript retrieval service was a remote computing system or it was an electronic communication system. *See* Ontario Pet. App. 80.

On appeal, Arch Wireless' position remained the same. Before the Ninth Circuit, Arch Wireless conceded that its services could only be considered as that of a RCS: "Contrary to Appellants' contention, Arch Wireless provided a 'Remote Computing Service' to the City of Ontario under the terms of the statute."

See Arch Wireless' Opp. Brief, 8. At no time before the Ninth Circuit issued its decision had Arch Wireless ever suggested that it provided a dual service or that its services could ever be considered that of an ECS.

Now, after the Ninth Circuit applied a practical application of the plain language of the SCA, Arch Wireless now seeks to change course.

Knowing that it is impossible to argue around the SCA's definition of an ECS, Arch Wireless now concedes: "Arch Wireless unquestionably acts as an 'electronic communication service' provider when it transmits text messages over its network, and its temporary storage of contents in connection with the transmission process constitutes 'electronic storage.'" *See* Arch Wireless Pet. 16.

Recognizing futility, Arch gives in, and now claims that the panel decision is erroneous because it purportedly failed to take into account the dual functions Arch's service provides. Remarkably, Arch Wireless fails to inform this Court that it was Arch Wireless itself who asked the appellate court to ignore the possibility of a dual function. Because Arch Wireless failed to ever make this argument to either the District Court or the Ninth Circuit, they have failed to preserve it for review.

Next, Arch Wireless spends time and ink arguing that the statutory text of the SCA allows an entity to provide dual services. Arch Wireless points to the legislative history which it suggests confirms its position. The problem Arch Wireless faces is that it

never suggested that it provided a dual service and the claim is now waived. To claim error on the part of the Ninth Circuit for assuming that such a possibility existed – in light of Arch Wireless' expressed position to the contrary – is flawed. More importantly, it utterly fails to demonstrate that review is warranted in this case.

Moreover, Arch Wireless' argument that it is both an ECS and a RCS finds no support in the record. As noted above, Arch Wireless concedes (for the first time) that it acts as an ECS when it transmits text messages. However, Arch Wireless claims that "is not at issue" here. *See* Arch Wireless Pet. 16. Arch Wireless suggests that Plaintiffs allege that Arch Wireless violated the SCA by divulging to Ontario the contents of messages "that were retrieved from its long-term archives – long after the messages were delivered and the temporary storage was deleted." *See* Arch Wireless Pet. 16. This suggestion is wrong.

Plaintiffs have alleged and proven that Arch Wireless violated the SCA when it divulged messages held in "electronic storage" as that term is defined at 18 U.S.C. § 2510(17). Plaintiffs have never suggested that the messages were retrieved from "long term archives," and Arch Wireless never presented any such evidence. Likewise, Arch Wireless failed to present any evidence that the text messages had already

been delivered and that "temporary storage was deleted."[4]

More importantly, Arch Wireless' services could only be considered that of an ECS. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). On its face, this describes exactly the service that Arch Wireless provided to Ontario, as conceded by Arch Wireless.

In addition, to be considered a RCS, one must provide "computer storage or processing services." 18 U.S.C. § 2711(2). Based upon the evidence, it was clear that Arch Wireless was not providing "computer storage" or "processing services." Although Arch Wireless was "storing" messages, this incidental function was the type Congress clearly felt an ECS would perform.

The Ninth Circuit reviewed the legislative history of the SCA, and found that the Senate Report identified two main services that providers performed in 1986: (1) data communication; and (2) data storage and processing. The Ninth Circuit reasoned that when Congress referred to RCS's "storage and processing of information," it meant the actual storing of virtual information or the farming out of sophisticated processing to a service that would process the

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[4] Virtually all of the evidence relied upon by the Ninth Circuit was from the testimony of Arch Wireless' Director of Information Technology.

information. Neither of these services even remotely describes the services Arch Wireless provided to Ontario. Since Arch Wireless could never qualify as a RCS based upon the plain language of the SCA, as well as its legislative history, the Ninth Circuit's decision represents a straightforward and legally sound decision. Not only has Arch Wireless failed to demonstrate that their position is legally sound, it has utterly failed to demonstrate that the issue is one that warrants review.

II. The Ninth Circuit's Opinion Does Not Warrant Review

The Ninth Circuit's opinion does not warrant this Court's review because there is no conflict to be resolved. In this case, Plaintiffs sought to enforce their rights under the SCA based upon Arch Wireless' disclosure of text messages to Ontario. Arch Wireless maintained throughout the proceedings below that it acted as a RCS and its disclosure to a subscriber was legally permissible. Plaintiffs argued that Arch Wireless acted as an ECS and since they did not consent to the disclosure, Arch Wireless acted illegally. The District Court sided with Arch Wireless, but the Ninth Circuit reversed. Beyond a simple disagreement with the outcome, Arch Wireless has offered no compelling reason for this Court to grant review.

Arch Wireless argues that review of the SCA would be necessary if review is granted as to Ontario. However, in Ontario's petition for review, not one

mention of the SCA is made. Ontario, who seeks review of the Fourth Amendment claim, does not feel that review of the SCA is necessary. In passing, Arch Wireless states review is necessary so this Court can "correct the Ninth Circuit's misguided understanding of the statutory framework." *See* Arch Wireless Pet. 18. However, Arch Wireless never identifies how the Ninth Circuit's opinion is wrong.

Finally, Arch Wireless makes an emotional plea that "the world's leading providers of computing and online services are located within the Ninth Circuit" and that a "host of unintended consequences" will result if review is not granted. *See* Arch Wireless Pet. 20-21. The claim is grossly overstated.

Contrary to the claim, not every "storage" maintained by a provider of electronic communication will automatically constitute "electronic storage." *See* Arch Wireless Pet. 21. A court will be required to review the actual service provided between the entity and the provider. Here, Ontario clearly paid Arch Wireless to provide it with the ability to "send or receive wire or electronic communications," or text messages. *See* 18 U.S.C. § 2510(15). Thus, the service it provided was that of an ECS.

Arch Wireless' suggestion that the Ninth Circuit somehow eviscerated a provider's ability to act as a RCS is simply false. If a provider provides "storage or processing services," then it is a RCS. What Arch Wireless is really advocating for is the ability to provide a service, but not comply with the federal

disclosure requirements. Arch Wireless allows individuals to communicate electronically and that decision to provide the service is significant and valuable in this electronic age. However, it also requires that they comply with what Congress has determined to be necessary steps to preserve the privacy rights of the individuals using that service. It is simply the price of doing business. If Arch Wireless feels that the SCA strikes an unfair balance in favor of privacy rights, then it should seek to have the law changed.

Arch Wireless has not demonstrated that the Ninth Circuit's opinion warrants review, or that the decision is legally flawed.

CONCLUSION

For the foregoing reasons, the Petitions brought by Ontario and Arch Wireless for writs of certiorari should be denied.

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No. 08-1472

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In The

Supreme Court of the United States

USA MOBILITY WIRELESS, INC.,

Petitioner,

v.

JERILYN QUON; APRIL FLORIO;
JEFF QUON; STEVE TRUJILLO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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City of Ontario, Ontario Police Department, and Lloyd Scharf ("City Petitioners") are petitioners in Case No. 08-1332. That petition is the basis for the Conditional Cross-Petition for a Writ of Certiorari filed by USA Mobility Wireless, Inc. in the instant case. City Petitioners do not oppose the Conditional Cross-Petition, which raises only an issue under the Stored Communications Act, 18 U.S.C. §§ 2701-2712. The Petition for a Writ of Certiorari filed by City Petitioners does not address that issue because City Petitioners prevailed in the trial court on the Stored Communications Act claims against them, and plaintiffs and appellants below did not thereafter pursue any Stored Communications Act claims against City Petitioners on appeal. See Appendix in Case No. 08-1332 at 11 n.3 (Ninth Circuit opinion noting that plaintiffs and appellants did not raise, and therefore waived, any Stored Communications Act claims against City Petitioners on appeal).

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No. 08-1472

In the Supreme Court of the United States

USA MOBILITY WIRELESS, INC.
PETITIONER,

v.

JERILYN QUON; APRIL FLORIO; JEFF QUON;
STEVE TRUJILLO,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

Plaintiffs' brief in opposition offers no persuasive reason to deny review of the Stored Communications Act ("SCA") issues in this case, if this Court grants review of the Fourth Amendment questions presented by the City of Ontario. Indeed, plaintiffs concede that the statutory issues are intertwined with, and properly inform, the Fourth Amendment analysis. Plaintiffs also offer no genuine defense of the Ninth Circuit's flawed statutory interpretation, and instead rest almost entirely on a waiver argument that is thoroughly meritless and misstates the record below.

The petition filed by the City presents constitutional issues of great importance on which the lower courts are divided, and plainly merits review. Plaintiffs' attempts to deny the circuit splits and minimize the significance of the Ninth Circuit's decision simply mischaracterize that decision or ignore the obvious import of the court's reasoning. Arch Wireless will leave those issues to the City. If this Court grants the City's petition, it should grant Arch Wireless's conditional cross-petition and consolidate the petitions for argument.

1. Arch Wireless's cross-petition explained that the Ninth Circuit misunderstood the SCA's careful (if semantically confusing) distinctions between information in "electronic storage" incident to the transmission of communications, and information maintained in computer storage for other purposes. Arch Wireless Pet. 3-6, 11-17. It also explained that the Ninth Circuit's assumption that a provider must either provide "electronic communication services" ("ECS") or "remote computing services" ("RCS"), but not both, is "impossible to square with the statutory

text." *Id.* at 2. Plaintiffs' suggestion that Arch Wireless "never identifies how the Ninth Circuit's opinion is wrong," Opp. 24, is therefore puzzling at best.

Plaintiffs endorse the Ninth Circuit's errors but conspicuously avoid any real engagement with the statutory text or legislative history. They simply assume, like the court of appeals, that "Arch Wireless clearly stores messages for backup protection based upon the undisputed evidence that they, among other things, 'archive' messages for 'recordkeeping purposes.'" Opp. 17. As Arch Wireless explained, however, information is held "for backup protection" within the unique terminology of the SCA only if it is backup for "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17). *All* other forms of computer storage (including archives for recordkeeping purposes) constitute "remote computing services" not "electronic communication services." Those definitions are at the heart of the statute's careful distinction between active, ongoing communications (which Congress thought to be entitled to greater privacy protections, by analogy to wiretapping restrictions) and mere archived records of such communications (less private, by analogy to the rules traditionally governing information in the hands of third parties). Plaintiffs' position, like the Ninth Circuit's, improperly collapses those pivotal distinctions.

Plaintiffs are studiously vague about whether they agree with the Ninth Circuit that a company provides either ECS or RCS, but never both. At one point plaintiffs assert that since "Ontario clearly paid Arch

Wireless to provide it with the ability to 'send or receive wire or electronic communications,' or text messages" then the "service it provided was that of an ECS." Opp. 24. But Arch Wireless's role in sending and receiving text messages is not at issue in this case; rather, the case concerns its disclosure of message contents from long-term archives. To the extent plaintiffs are endorsing the Ninth Circuit's view that everything an ECS provider does is necessarily ECS, that is incorrect and unworkable for reasons explained in detail in the cross-petition (at 11-17). Forcing ECS providers to apply the ECS rules to all services they provide would result in enormous administrative burdens and ultimately cause ECS providers not to maintain any non-ECS archives at all—to the detriment of these businesses, their customers, and law enforcement. *See* Arch Wireless Pet. 21-23. Plaintiffs dismiss those costs as "the price of doing business," Opp. 25, but that is not what Congress intended.

Elsewhere in the brief in opposition, plaintiffs hint at a more nuanced argument—that Arch Wireless's storage of these messages should be governed by the ECS regime because it was somehow "incidental" to the ECS services Arch Wireless provided. Opp. 22. But of course the statute defines when storage is "incidental" to ECS in the relevant sense: only when it is "backup protection of" "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17). The archives at issue in this case clearly do not satisfy that definition—as the statutory language, legislative history, and DOJ guidelines make clear. Arch Wireless Pet. 11-17.

Finally, plaintiffs attempt to evade the Ninth Circuit's misconstruction of the statute by arguing that, factually, "Arch Wireless'[s] argument that it is both an ECS and a RCS finds no support in the record." Opp. 21. But plaintiffs do not genuinely dispute the pertinent facts—that these messages were archived in Arch Wireless's billing system to respond to potential customer inquiries, not as temporary, intermediate storage incidental to the original transmission. As explained by Steven Niekamp, Arch Wireless's Director of Information Technology, whenever Arch Wireless receives a text message over its wireless network, it keeps a temporary copy on its computer server and archives a separate copy for long-term storage. Pet. App. 3. Arch Wireless holds the temporary copy on its computer server for a maximum of 72 hours, or until the recipient pager is able to receive delivery of the message, after which the message is deleted. Pet. App. 3-4. That function is an ECS, because the temporary copy acts as "electronic storage"—holding the message for "backup protection" on a "temporary, intermediate" basis incidental to transmission. 18 U.S.C. § 2510(17). Arch Wireless maintains the *archived* copy in its billing system in order to respond to potential inquiries from subscribers regarding missed messages or the accuracy of billing statements. ER 169.[1] That long-term purpose is entirely distinct from the transmission of the message and is properly characterized as the RCS function of "computer storage." 18 U.S.C. § 2711(2); *see* Arch Wireless Pet. 14-17.

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[1] "ER" refers to the Excerpts of Record filed with the Ninth Circuit.

Plaintiffs suggest that Arch Wireless "never presented any such evidence," but what they really mean is that the evidence presented somehow does not count because it came from Niekamp's testimony. Opp. 21, 22 n.4. Niekamp is the most knowledgeable authority on Arch Wireless's technology practices, and plaintiffs presented no contrary evidence. The district court saw no genuine factual dispute, and correctly held that Arch Wireless was entitled to summary judgment on the ground that the storage in question "is not incidental to the transmission of the communication itself, and is not meant for backup protection but apparently as the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism." Pet. App. 78. Plaintiffs did not argue on appeal that Niekamp's technical testimony was factually incorrect or disputed, or that the district court erred by failing to recognize a material *factual* dispute. Plaintiffs' argument to the Ninth Circuit was that this secondary archiving could not be considered a "remote computing service" as a matter of law, because "Arch just does it, apparently for its own purposes" and "[i]t is not part of any service Arch provides (as evidenced by the Sales and Service Agreement [with the City])." Appellants' Opening Br. at 15-18. Plaintiffs even admitted at oral argument that this storage was not for "backup protection" within the peculiar meaning of the SCA.[2] And the Ninth Circuit ultimately reversed the district court's interpretation of the statute as a matter of law, with no indication that the *facts* were meaningfully disputed.

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[2] *See* Audio Recording of Oral Argument at 5:33-5:45, *available at* http://tinyurl.com/07-55285-oa ("It is unknown why the messages are archived. They were not for backup purposes . . . .").

2. Perhaps recognizing the weakness of their underlying position on the merits, plaintiffs devote most of their brief in opposition to arguing that Arch Wireless "never suggested that it provided a dual service" below and thus "the claim is now waived." Opp. 20-21. That is just false. Arch Wireless's briefing in the courts below sensibly focused on the proper characterization of the messages archived in long-term storage because the disclosure of those stored messages to the City gave rise to this litigation. Arch Wireless had no reason to brief the proper characterization of *other* services it provides but that are not in any way at issue in this case. Yet Arch Wireless never denied—and in fact acknowledged in its motion to dismiss—that it maintained certain types of unrelated temporary storage incident to transmission that would be properly defined as ECS. Arch Wireless explained to the district court that plaintiffs' complaint "contains no allegations that the 'storage' *at issue* was part of the transmission of the messages disclosed," but instead "affirmatively alleges that the storage *at issue* was of messages that had been transmitted a month before they were disclosed." ER 50-51 (emphasis added); *see also* ER 52-53 (describing messages retained during the transmission process as part of "electronic storage"); ER 317-19 n.8 (noting in Arch Wireless's brief for summary judgment that the messages at issue were not in electronic storage "at the time they were provided"). Certainly there was no need to belabor the obvious fact that Arch Wireless provides ECS when it actually transmits text messages over its network.

Similarly, there is no basis at all for plaintiffs' claim that Arch Wireless somehow invited the error of the

Ninth Circuit by affirmatively asking it "to ignore the possibility of a dual function." Opp. 20. To the contrary, Arch Wireless's Ninth Circuit brief argued that the service it provided, "*at least in part*, was a 'remote computing service,'" and that the service actually at issue here should be characterized as RCS. Arch Wireless Responding Br. 7 (emphasis added). The relevant section of Arch Wireless's Ninth Circuit brief adopts the district court's reasoning in full, and explains that "Arch Wireless acted as a remote computing service *when it divulged the subject communications*." *Id.* at 8 n.1 (emphasis added). Arch Wireless never argued that Arch Wireless "provided a RCS exclusively." Opp. 18. The only support plaintiffs muster for that accusation is a passage in Arch Wireless's brief stating that "'[c]ontrary to Appellants' contention, Arch Wireless provided a "Remote Computing Service" to the City of Ontario under the terms of the statute.'" Opp. 19-20 (quoting Arch Wireless Responding Br. 8). Obviously that is not, as plaintiffs would have it, an argument that Arch Wireless's "services could *only* be considered that of a RCS." Opp. 19 (emphasis added). The heading on the immediately prior page makes clear that Arch Wireless's argument remained, throughout, focused on the proper characterization of the disclosure actually at issue in this case. *See* Arch Wireless Responding Br. 7 heading B ("The Divulgence By Arch Wireless of the Subject Stored Communications Fell Within the Exception Provisions of 18 U.S.C. § 2702(b)(3) and Relieves Arch Wireless of Liability").

3. Plaintiffs' remaining procedural arguments have even less merit. Plaintiffs suggest that Arch Wireless is attempting an "end-around" by filing a cross-petition

30 days after the City Defendants' petition, which was "utterly silent" as to the Ninth Circuit's ruling against Arch Wireless. Opp. 16. The City was not held liable under the SCA, so it had absolutely no reason to raise SCA issues pertaining only to a codefendant in its own petition for certiorari. And Arch Wireless's conditional cross-petition was filed on the deadline established for such filings by this Court's Rule 12.5, consistent with standard practice. Indeed, if filing on the last day permitted by the Rules were somehow inappropriate, plaintiffs' brief in opposition would suffer from the same defect.

4. Plaintiffs claim that Arch Wireless "has offered no compelling reason for this Court to grant review." Opp. 23. But plaintiffs concede the crucial point—which is that the proper resolution of the SCA issues will inform the Fourth Amendment analysis. Plaintiffs affirmatively rely on the SCA in responding to the City's Fourth Amendment arguments—asserting that "[t]he fact that the Plaintiffs' text messages were protected from disclosure under the Stored Communications Act served as a legal basis for the Plaintiffs to objectively believe that their text messages would remain private." Opp. 15. Of course if plaintiffs are wrong about what the SCA means, the opposite will be true. In a thorough evaluation of the Fourth Amendment issues, this Court will inevitably confront the SCA questions underlying this litigation. This Court might as well resolve those questions, and have the benefit of briefing from the parties and *amici* most directly interested in them.

Finally, plaintiffs suggest that Arch Wireless overstates the consequences of the Ninth Circuit's erroneous interpretation of the statute. Opp. 24. But

plaintiffs' substantive argument is simply that some RCS providers will not also provide ECS, and therefore will be unaffected by this decision. *Id.* Perhaps. Today, however, pure RCS providers are rare because most businesses now archive and analyze data themselves. Regardless, plaintiffs have no response to Arch Wireless's core point: that the Ninth Circuit's reasoning will force most providers whose primary service is ECS into treating all of their *other* functions in the manner the statute requires for ECS, which will be burdensome and inconvenient—if not altogether unworkable—for the companies, their customers, and law enforcement.

CONCLUSION

For the reasons set forth above, if this Court grants review of the Fourth Amendment issues presented in the City Defendants' petition, then it should also grant this cross-petition.

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No. 08-1472

In the Supreme Court of the United States

USA MOBILITY WIRELESS, INC.,
PETITIONER,

v.

JERILYN QUON, APRIL FLORIO, JEFF QUON,
STEVE TRUJILLO,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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RULES

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Pursuant to Rule 44.2, petitioner USA Mobility Wireless, Inc. ("USA Mobility") respectfully petitions for rehearing of this Court's December 14, 2009 Order denying certiorari in this case. Petitions for rehearing of an order denying certiorari are generally granted if a petitioner can demonstrate "intervening circumstances of a substantial or controlling effect" or if a petitioner raises "other substantial grounds not previously presented." Rule 44.2.

On the same day this Court denied USA Mobility's conditional cross-petition, it granted a separate petition filed by the City of Ontario in this case, raising Fourth Amendment issues. *See City of Ontario et al. v. Quon et al.*, No. 08-1332. In considering whether plaintiffs had a reasonable expectation of privacy in their pager messages, this Court may analyze whether the Stored Communications Act required USA Mobility to obtain plaintiffs' consent before releasing those messages to the City—and may conclude that the Ninth Circuit erred by holding USA Mobility liable under the Act.

To forestall any suggestion by plaintiffs that USA Mobility would be unable to benefit from such a ruling by this Court, and to prevent unnecessary litigation over the issue, USA Mobility respectfully requests that this Court hold this petition for rehearing until it issues an opinion in *Quon*. If it is appropriate in light of the issues this Court chooses to address in *Quon*, this Court should then grant USA Mobility's petitions for rehearing and certiorari and reverse or remand the Ninth Circuit's judgment as to USA Mobility.

CONCLUSION

The petition for rehearing should be held pending the outcome in *City of Ontario et al. v. Quon et al.*, No. 08-1332, and then granted.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

As counsel for cross-petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

DATED: January 7, 2010.



J. Scott Ballenger